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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1287

ASHLAND COAL AND ICE COMPANY, ET AL.

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION.

REPLY OF APPELLANTS TO MOTION OF APPELLEES TO AFFIRM JUDGMENT.

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PRELIMINARY STATEMENT.

The motion to affirm contains a complete summary of the proceedings before the Interstate Commerce Commission and the lower Court and for brevity it will not be repeated here.

The Court below and the government in its motion to affirm rely upon two propositions, viz.: (a) the matter of jurisdiction to review an order of the Interstate Commerce Commission, such as that involved herein, and (b) the merits.

ARGUMENT.

1. On the question of jurisdiction the motion to affirm adopts as its own and supports what we believe to be the erroneous theory of the Court below, viz., that there is something inherent in the so-called "scheme of reparations" which gives added power to the Commission and a degree of finality to its orders beyond that applying with respect to other types of orders, and that this is a case where the provisions of section 9 of the interstate commerce act involving an election of remedies come into play.

Neither of these theories reflects a proper concept of the nature of this suit. We do not challenge the original and exclusive jurisdiction of the Commission to determine the question of reasonableness either for the past or for the future. That question is settled by *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426 (1907). We do not challenge the power of the Commission to find, on *substantial evidence*, that a rate may be reasonable in the past but unreasonable for the future, or *vice versa*. That question is settled by *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. Co.*, 233 U. S. 479 (1914). Nor did we ask of the lower Court any order either awarding reparation as an original proposition or to effect any change in an order of reparation by the Commission (Compare *Baltimore & O. R. Co.* v. *Brady*, 288 U. S. 448 (1933).

What we did contend was that the Commission, acting under a single standard of reasonableness and upon a single mass of evidence, has reached diametrically opposed conclusions on the question of past and future reasonableness, without making the necessary preliminary findings of fact to support them. Since these defects and omissions are apparent on the face of the Commission's decision the situation comes within the rule of *Florida* v. *United States*, 282 U. S. 194 (1931),[1] to the effect that a finding merely "in the

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[1] Followed in *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499; *City of Yonkers* v. *United States*, 320 U. S. 685.

language of the statute" is not enough. We sought in the lower Court a finding to that effect and an order remanding the case to the Commission for action within the framework of the statute.

While it is true that a decision of the Commission, *on substantial evidence,* that an assailed rate is not unreasonable, *both* as to the past and for the future would be conclusive upon the Courts, there is an obvious distinction between a finding of that character and findings as those here involved. It is our contention that opposing conclusions reached on the same evidence and under a single standard set by statute should be spelled out "with the simplicity and clearness through which a halting impression ripens into reasonable certitude" and that "something more precise is requisite" in support of such opposing conclusions than the mere lifting of a supposed principle from another case bottomed upon a factual foundation having nothing in common with the case at bar (Compare *United States* v. *Chicago, M. S. P. & P. R. Co., supra*). This is particularly true when it is considered, as the report of the Commission shows, that the affirmative evidence on the question of reasonableness was based upon a study of the cost of performing the service and that the "study period" covered the years 1935 to 1939 (later revised so as to take in 1940). The effect of the Commission's decision is that 1935 to 1940 cost data spelled out a case of *future* unreasonableness (1944 and later) but that the rates were reasonable during the study period for which the data spoke. Following out the permissive range of discretion announced in the *Baer Case, supra,* a conclusion exactly the opposite of that reached would have been far more realistic.

There is nothing in law or logic to support the theory that arbitrariness may find a safe refuge behind the so-called "scheme of reparations" any more than it could do so with respect to any other function of the Commission. It is true that the Courts have held that a finding of *past* unreason-

ableness is a quasi-*judicial* function[2] whereas a finding for the future is quasi-*legislative*. But the difference does not rest upon any difference in the *standards* of reasonableness or upon any difference in the duty of the Commission in the exercise of the art of rate making. It rests solely upon the proposition that a finding as to past unreasonableness necessarily involves an award of monetary damage. This was made perfectly clear by this Court in *Mitchell Coal & Coke Co.* v. *P. R. R. Co.*, 230 U. S. 247 (1913) when it expressly limited the "right of contestation" as to reparation orders to matters bearing directly upon the question of damage.

The only semblance of color to a contention that findings of past reasonableness and dismissals of complaints involving reparation have ever stood upon a special plane in the matter of judicial review is the fact that for years such orders were regarded as "negative orders" immune from review under the doctrine announced in *Proctor & Gamble* v. *United States*, 225 U. S. 282 (1912) and the fact that that doctrine was not rejected as a proper "touchstone of jurisdiction" until *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, decided in 1939, perhaps explains why similar orders of the Commission have not been judicially challenged heretofore and why this is a case of first impression.

The holding of the lower Court and the argument of the government that this is a case where we are estopped from seeking judicial review by an election of remedies is equally unsound. As a practical matter where a question of reasonableness is concerned there is no real election of remedies.[3] That was made clear in the *Abilene Case, supra.*

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[2]Because under the rule of *Southern P. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, such a finding carries with it an award of damage, as of course, in the precise amount of the unreasonableness found.

[3]The only occasion for touching upon the matter of "election of remedies" in *Baltimore & O. R. Co.* v. *Brady, supra*, was because the shipper in that case sought to change the *amount* of a Commission award on the theory that the Commission had erroneously applied the "mitigation of damage" rule.

While it might be possible to lodge a complaint with the Commission praying that it limit its decision as to the past to the bare question of reasonableness, leaving to the shipper the right to pursue his claim for damage through the Courts, there would be no point in taking such a step in view of the damage *per se* rule of the *Darnell-Taenzer Case, supra,* and we know of no case where such procedure has been followed.

The only situation in which there is a real election in the matter of remedy where an administrative function of the Commission is concerned[4] is where there is a contention that the carrier has charged the shipper in an amount different from and higher than the charge provided in its published tariffs, commonly referred to as "overcharge" claims. As to them there is a true right of election since this Court has held that a question of tariff construction, unlike a question of "reasonableness", can be decided initially by a Court of competent jurisdiction. *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285 (1922). Such a case was *Standard Oil Co.* v. *United States,* 283 U. S. 235, referred to at pp. 8 and 9 of the Motion to Affirm. In that case the shipper contended before the Commission that it had been subjected to charges higher than those legally applicable under the published tariffs. Having thus elected in which forum—the Commission or the Courts —it should pursue its remedy it was very properly precluded from attempting a second presentation in the Courts.

A similar situation was presented in *Atlantic Lumber Co.* v. *Southern Pac. Co.,* 47 Fed. Supp. 511, 514. There, as in the *Standard Oil Case* just cited the sole question presented to and decided by the Commission was whether the shipper had been subjected to charges over and above the published

[4]We speak here, of course, of matters concerning the charging and collecting of freight rates.

tariff rates. While certain statements lifted from context[5] may appear to lend support to the sanctity theory as to reparation orders, we submit that the value of the case as a precedent must be measured by the fact situation considered. It should be borne in mind, too, that more than the simple denial of reparation is involved here. The basic question here is whether there is arbitrariness in reaching opposing conclusions on the same evidence without the essential preliminary findings to support such opposing views.

While the decision in *George Allison & Co.* v. *United States*, 12 F. Supp. 862 (affirmed per curiam in 296 U. S. 546) did not turn on the matter of "overcharge", we submit that there are two reasons why it is without any value as a precedent here. Development of these reasons will require a brief resume of the proceedings before the Commission in that case.

The case before the Commission was an attack upon the "express" rates on strawberries and the complaint prayed for reparation on past shipments and reduced rates for the future. Two decisions were rendered by the Commission. The first (190 I. C. C. 520) by Division 5, found the rates[6] unreasonable to the extent they exceeded 120 per cent of the contemporaneous first-class railroad freight rates, and awarded reparation on past shipments down to that basis. The reduced rates thus prescribed became effective on March 3, 1933. Eight months later, or on November 7, 1933, the entire Commission, in a report on reargument, ordered the rates for the future reduced still further, or to 105 per cent of the railroad first-class freight rates and

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[5]Such as that at p. 513, reading: "The power to give reparations in rate cases is of statutory genesis and was unknown at common law. It is a discretionary authority reposed in the Commission in order to round out the scheme of regulation. Congress endowed with administrative finality such orders of the Commission."

[6]Refrigeration charges were also involved but for simplicity we confine ourselves to rates.

the new basis was ordered to become effective on December 28, 1933. For the past, however, the Commission awarded reparation only to the higher level (120%) previously prescribed by Division 5, *and which had been in effect since March 3, 1933.* Its order was attacked, so far as the past was concerned, because the Commission had "acted without any evidence to support the distinction, since the hearings had been closed in October, 1931, and no evidence was or could have been offered to establish a difference in conditions between services rendered before December 28, 1933, and those to be rendered thereafter."

The first point we make is that in the factual framework of that case the Court was bound to dismiss the suit because of the rule which this Court had announced in 1932 in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U. S. 370, to the effect that if the carriers are applying a rate prescribed by the Commission in its quasi-legislative capacity and hence are acting under compulsion of a Commission order, the Commission cannot later in its quasi-judicial capacity compel a retroactive reduction of that rate.

But our second and most important point is that the report of the lower Court plainly discloses that it grounded its dismissal primarily on the "negative order" doctrine, since that doctrine had not then been rejected.[7] For example, after pointing out (p. 863) that "The defendants do not attempt to support on the merits the fixing of higher rates for past services than for future services" the Court remarked (p. 863) that "they urged that the parts of the order under attack may not be reviewed because they are negative in character and concern reparation." At p. 864 of its decision the Court squarely relied upon the *Procter & Gamble Case* and when it stated (p. 864) that—

> There can be no substantial difference between review of an order denying a shipper reparation, and review of an order granting some damages but denying the full reparation sought,

[7]The decision in the *Rochester Telephone Case* came later, in 1939.

it referred to this Court's decision in *Hooker* v. *Knapp*, 225 U. S. 302, decided contemporaneously with the *Procter & Gamble Case* and upon the authority of the latter. Additionally, the *Allison Case* did not present the basic question here involved because here, on the very evidence upon which rates were reduced for the future the Commission, "in the language of the statute" has found them not unreasonable during the period for which the evidence spoke.

2. In discussing the merits movants state at p. 10:

> In determining the validity of the Commission's action under such circumstances the judicial inquiry is exhausted when it is determined that there is a rational basis and substantial evidence to support the conclusion approved by the Commission.

We have no quarrel with that statement as an abstract proposition, nor do we deny that the Commission had "substantial evidence" (our own evidence) to show that the assailed rates were unreasonable. But what could be "rational" about a decision which concludes that cost evidence adduced over the period from 1935 to 1940 spells out unreasonableness from and after 1944 but not during the cost study period?

In the *Milwaukee Case, supra*,[8] this Court was considering an order of the Commission in which it had exerted its administrative discretion to direct the cancellation of rates which the rail carrier had filed pursuant to its right to initiate rates. The reports of the Commission[9] contained some 19 pages of discussion and reasoning but fell short of saying with particularity in just what respect the carrier-made rates were in violation of the law. Speaking of such generalities this Court, speaking through Mr. Justice Cardozo, stated at pp. 510, 511:

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[8] *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499.

[9] 197 I. C. C. 245; 200 I. C. C. 609.

We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that *it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude.* In the end we are left to spell out, to argue, to choose between conflicting inferences. *Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency.* Beaumont, *S. L. & W. R. Co.* v. *United States*, 282 U. S. 74, 86, 75 L. Ed. 221, 229, 51 S. Ct. 1; *Florida* v. *United States*, 282 U. S. 194, 215, 75 L. Ed. 291, 304, 51 S. Ct. 119. We must know what a decision means before the duty becomes ours to say whether it is right or wrong. (Emphasis supplied).

Any fair appraisal of the language used by the Commission in this case under the general heading "Reparation"[10] will show that it is subject to similar criticism. The observation, for example, that the assailed rate of $2.65 had its root in a rate of $1.50 effective in 1915, can have nothing but historical value and very little of that in connection with a rate in effect 20 years or more later. Further, the Court will note that in the interval the rate had been increased by $1.15 per ton or 76 per cent. Similarly valueless are the statements as to rates to other territories since our case was presented solely upon the basis of the cost of service as the report of the Commission shows.

It is plain from the face of the Commission's decision that it relied primarily upon the statement of principle lifted bodily from a case decided in 1926 on a state of facts

[10]And found in 256 I. C. C. 429, at pp. 451, 452.

entirely foreign to those involved in this case. This statement of principle reads:

> When we are of the opinion that rates have become unreasonable as the result of changes in conditions so gradual that no date can be pointed out upon which they became unreasonable, and the history of the rates is such as to justify the carriers in believing that they were maintaining rates which had our approval, we have the power to fix the reasonable rates for the future, and, in that "flexible limit of judgment which belongs to the power to fix rates" to refuse to hold the rates unreasonable in the past.

We submit first of all that the statute confers no power upon the Commission "to refuse to hold rates unreasonable in the past" under any circumstances. On the contrary, the statute simply declares that rates must be "just and reasonable", and prohibits and declares unlawful all "unreasonable rates" with no distinction as between the past and present or future. Further, the statute contains complete machinery for the recovery of damages for violations of the act and damages bespeak past offenses, so far as rates are concerned.

We submit further that when the Commission abandons the ordinary tests for determining reasonableness in favor of what the carriers were "justified in believing" about their rates, or upon the fact that "no date can be pointed out upon which (the rates) became unreasonable" it is substituting for something concrete or tangible something which is so vague and conjectural as to amount to no standard at all.

The acceptance in this case of what the carriers were "justified in believing" about their rates as a ground for denying reparation is in sharp contrast with the refusal of the Commission to accept it as a defense in connection with earlier cases[11] involving the same carriers, the same

[1] *State Corp. Comm. of Virginia* v. *Norfolk & W. Ry. Co.*, 190 I. C. C. 325; and *Staunton Brick Co.* v. *Chesapeake & O. Ry. Co.*, 190 I. C. C. 302.

commodity, and the same rate structure with respect to destinations, Lynchburg, Va., and west. In those cases the carriers refused to honor the Commission's reparation awards and it became necessary to sue upon them.[12] Again, in the Court the railroads raised the point that they were "justified in believing" that the rates they charged were reasonable rates. Speaking of the defense in the *Danville Case*,[13] the Court said at pp. 628, 629:

> The defense which is most earnestly urged and raises the most difficult question is the fifth, which asserts, in effect, that the assailed rates and similar had received the previous approval of the Commission; that they had been long maintained without complaint by shippers and compared favorably with other rates in the same general territory; that this prior approval, favorable comparison with other rates, and long maintenance without complaint were proper guides to the defendants in determining the reasonableness of their rates and upon which they had a right to rely to the extent of not thereafter being held for reparation. And that for these reasons the Commission was without authority to hold the rates unreasonable in the past and order reparation.
>
> The defendants based their contention here upon the case of *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 52 S. Ct. 183, 76 L. Ed. 348, and upon what they assert is the proper interpretation and effect of that case. While argument in briefs and orally has taken a wider range, it comes in the end to a question of the authority of the Commission to award reparation growing out of a rate which, so the carriers contend, had received the prior approval of the Commission and which had been long maintained in reliance upon that approval.

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[12]The decisions by Judge Paul are in *City of Danville* v. *Chesapeake & O. Ry. Co.*, 34 Fed. Supp. 623; *City of Harrisonburg* v. *Chesapeake & O. Ry. Co.*, 34 Fed. Supp. 641; and *American Furniture Co.* v. *Norfolk & W. Ry. Co.*, 34 Fed. Supp. 647 (all in 1940).

[13]The Court below in this case accepts Judge Paul's view in principle.

> It may be said in passing that the fact that a rate has been in effect and that a large volume of traffic has moved under it without complaint *is not conclusive that the rate is not unreasonable.* It is true that where a rate is in effect and no one from whom the rate charged is exacted complains of it, the very absence of any complaint would indicate that the shipper was satisfied that he was not being unreasonably charged. And the longer this condition continued the stronger would be the evidence that the rate was not unreasonable. *But if the payment by shippers, for any substantial period, of a rate fixed by a carrier were to preclude inquiry into its reasonableness we would have an effective barrier to changes in rates and to reparation,* for the latter at least is based only on what the shipper has previously paid out under the rate. The claim for reparation would be defeated by the very fact that the payments made by him and for which he claimed reparation were proof that the rate was reasonable. That the Commission in determining the reasonableness of a rate *may* consider the period over which it has been maintained, the unconmplaining acquiescence of shippers in it, its similarity to other rates, I have no doubt. And I have no doubt that the Commission does so. But this determination, upon whatever proper evidence or considerations based, is a matter for the Commission. And the Court would not be justified in interfering with it, in the absence of other considerations or conditions affecting the Commission's authority.

and in the *American Furniture Case,* at pp. 650, 651, the Court reiterated:

> The grounds of defense in Nos. 4, 5 and 6 are based on the theory that since the rates assailed had been long in effect and had conformed, *as the carriers believed,* to standards set up by the Commission, the Commission was estopped now to hold them unreasonable and particularly to grant reparation thereon. To this is added the contention that the Commission had, at a previous time, held that certain of the rates were not unreasonable. All of the questions raised by these defenses have been discussed at length in the opinion

> recently filed by this Court in case of *City of Danville* v. *Chesapeake & Ohio Ry.* (*Danville Hotel Co.* v. *Chesapeake & Ohio Ry.*), previously referred to. Everything said in those cases is applicable here and disposes of the contentions here made. Nor has any question been raised in the instant case that requires explanation or extension of what was there said. For that reason, the applicable portion of that opinion (34 F. Supp. 628) is here adopted without repetition in words. (Emphasis supplied).

Only a queer process of administrative reasoning could embrace and reject the same defense with respect to the same rate structure.

And no greater strength is assignable by way of defense to the statement by the Commission that the rates became unreasonable "as the result of changes so gradual that no date can be pointed out upon which they became unreasonable." Rate making has never reached that degree of mathematical precision upon which such a "date" could be fixed. Rates become unreasonable when the administrative agency charged with the duty of declaring them so has acted upon a mass of evidence concerning the question. In this case that evidence took the form of "cost" evidence and the study period embraced the years 1935 to 1940. In other words, in this case it should have been much easier to "spot" the date of unreasonableness than is ordinarily true when a case is made out upon rate comparisons with other rates. And no great difficulty in approximating the cost of handling an individual commodity—coal—presented itself here because 90 per cent or more of the traffic of these Pocahontas carriers consists of coal.

In recalling that the period during which a "gradual change of conditions" might arise in this case was from 1935, when the statute of limitations began to run as to our complaint filed in 1937, and 1943, when the case was finally decided, it is interesting to recall a statement made by the Commission as to the financial condition of these Poca-

hontas lines in 1937, the very year in which we filed our complaint, and one of the years included in the study period. In that year the Class-I carriers of the entire country had petitioned the Commission for general increases in their rates. When it came to the commodity—coal—it was immediately apparent that increases could not be granted to the northern lines, such as the Pennsylvania and withheld from the Pocahontas lines, without increasing the competitive advantages of the latter in areas served by both.[14] Faced with this dilemma the Commission was compelled to bestow unneeded increases on the Pocahontas lines. But in doing so it said:[15]

> The situation of the Pocahontas lines with respect to these bituminous-coal rates is an extreme case. The sole justification for increasing their rates on this traffic lies in the needs of other railroads, and it *shocks the conscience* that in accomplishing this purpose their revenues should be swollen by more than $6,000,000 which they do not need and which will not be used for any betterment of the general railroad situation. (Emphasis ours).

That was one of the most pronounced "changes of conditions" under which the Pocahontas carriers labored during the reparation period.

There is no question that denial of reparation in the circumstances of this case amounts to an assumption by the Commission of a discretionary power to grant or deny reparation, not upon the ordinary standards of unreasonableness, but as it sees fit.[16] It harks back to a similar attitude assumed by the Commission in the case of *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. Co.*, 30 I. C. C. 597, decided in

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[14]In the destination territory here involved the Pocahontas lines enjoy a complete monopoly of transportation.

[15]*General Commodity Rate Increases*, 1937, 223 I. C. C. 657, 745.

[16]This is made clear by its different approaches to the question west and east of Lynchburg.

1914. In that case the attack was on the rates on pig iron out of Birmingham, Ala., and the complaint contained a prayer for lower rates for the future and for reparation on past shipments. The Commission reduced the rates for the future but when it came to the question of reparation it summarily dismissed the complaint with these words:

> Reparation is prayed for, but under the circumstances of this case *we do not believe that it may fairly be awarded.* (Emphasis supplied).

That action, of course, amounted to a forthright assumption by the Commission unadorned by any language of generality of a complete discretion in the matter. The case had a very interesting subsequent history. Petitions were filed, the case was reopened and three additional reports were rendered.[17] Finally, in a fourth supplemental report[18] the Commission retreated from its original position and announced:

> We think that under all the circumstances complainants *are entitled to a finding* as to the reasonableness of the rates during the two years prior to the filing of the complaint. (Emphasis supplied).

At the same time it announced that upon petition of any party within 30 days it would reopen the proceeding for further proof on the point. If no such further petition was received *it would decide the question on the record made.* No request for such hearing was made and in a fifth supplemental report[19] reparation was granted for the full statutory period *and on the original record.* This Court sustained the grant in full in *Louisville & N. R. Co.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217.

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[17] 35 I. C. C. 460; 40 I. C. C. 738; 46 I. C. C. 558.

[18] 51 I. C. C. 635.

[19] 52 I. C. C. 576.

We submit that the action taken by the Commission in this case is no less summary than that taken in the original decision in the *Sloss-Sheffield Case.* True, it has used more words, but mere words cannot take the place of essential findings. Certainly the language used lacks that "simplicity and clearness through which a halting impression ripens into reasonable certitude" (*Milwaukee Case*).

For many years the Commission has played with the idea that awards of reparation should be left to its discretion and that no reparation should be awarded except where a rate assailed was so high as to amount to "extortion".[20] It has repeatedly urged upon Congress an amendment to the act which would give it such power and Congress has consistently refused such requests.[21] In 1916 (two years after its summary denial of reparation in the *Sloss-Sheffield Case*) the Commission recommended to Congress that it change the law so as to require as the basis for an award of damage under section 1 the same proof of *special* damage as is required in discrimination cases under section 3. Congress refused to do so and then two years later (in 1918) came the decision in the *Darnell-Taenzer Case, supra.* In announcing the rule of damage *per se* in that case this Court, through Mr. Justice Holmes, was very careful to distinguish between the sort of damage arising out of unreasonableness and that arising from discrimination. It said:

> The cases like *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, where a party that has paid only the *reasonable* rate sues upon a *discrimination* be-

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[20]At the argument in the Court below counsel for the Commission advanced a new theory, viz.:

> It seems to me too that it is entirely reasonable for this court to regard the Commission's action in this case as in the nature of a conditional action, that is, the Commission conditioned its order reducing rates for the future upon its ability to deny reparation for the past.

[21]Annual reports for 1916 (pp. 75-78); 1919 (pp. 17-21); 1930 (pp. 90, 93).

cause some other has paid less, are not like the present. There the damage depends *upon remoter considerations,* but here the plaintiffs have paid cash out of pocket that should not have been required of them, *and there is no question as to the amount of the proximate loss.* (Emphasis ours).

Having failed in that effort to temper its duty to award reparation under section 1, the Commission then took up the so-called "extortion" theory. The latter theory is best enunciated in a concurring expression by Commissioner Hall in *Plymouth Coal Co.* v. *P. R. R. Co.,* 56 I. C. C. 699 (1920) in which the Commission was awarding reparation under section 1. Commissioner Hall's views so clearly take in the "extortion" theory and the "carriers' belief" theory that we quote them rather fully. He said first:

> The act to regulate commerce lays upon the carrier the duty of publishing and establishing just and reasonable rates. The rates so established may not be departed from by shipper or carrier. Later on, in passing upon those rates, we may deem it fitting to prescribe a lesser rate as reasonable maximum for the future, but our power to do so is conditioned on our being of opinion that the existing rate is unreasonable. If both rates are within the "flexible limits of judgment" which the Supreme Court recognizes when exercised by us, and which presumably exist when exercised by a carrier in initiating a rate, it seems harsh to hold, in effect, that because the carrier *was unable to forecast* the precise rate within those limits which would later meet our approval it must repay the difference to the shipper who has paid it. But if the carrier charged with the statutory duty of initiating just and reasonable rates goes clear outside the limits of judgment and publishes rates *which are unconscionable for the service rendered,* and which plainly could not be approved by the regulating tribunal, however constituted, it seems but just that when the carrier's default is later remedied by that body through determination of what in its judgment would have been a maximum reasonable rate, the rate so determined should replace for all

> purposes *that which was extorted from the public,* and that all who paid *the unconscionable rate,* and not merely those who have complained about it, should have their loss made good by an award of reparation. (Emphasis ours)

This is definitely an exposition of the "extortion" theory. After expounding it, the Commissioner continued:

> I can see no element of *extortion* in a rate established by a carrier in the fair exercise of its best judgment as to what will be just and reasonable, even though that judgment does not exactly coincide with the judgment later formed by the regulatory body, and in such cases no reparation should be awarded unless it be upon proof of actual damage to complainant traceable to that error in judgment as proximate cause.
>
> But when nothing that can fairly be called judgment has been exercised by the carrier, and the rate established by it and exacted from the public is *unconscionable,* such that the regulating tribunal can properly say, "*The carrier must have known that this rate was unjust and unreasonable,* or should have known if it did not in fact," then *extortion* has been practiced and the carrier should be made to restore every dollar exacted by it in excess of the maximum rate which we later fix. (Emphasis ours)

Then after expressing his *personal* views Commissioner Hall continued:

> From the record now before us I am not convinced that the complainant has in fact suffered injury or damage, as those terms are known to the law, but under the doctrine laid down by the Supreme Court in the *Darnell-Taezner Case, supra, I feel constrained to share in this award of reparation.* (Emphasis ours)

Somewhat similar views had been expressed by the Commission in its annual report to Congress in 1919. There, after quoting from the *Darnell-Taezner Case* it said:

> That damages in a pecuniary sense must be *proven* upon an allegation of unjust discrimination or undue prejudice * * * and that no such proof is required upon an allegation of unreasonableness under section 1 of the Act allows the *cause, character, and measure* of the wrong rather than *proof of injury* to determine whether damages should be awarded. That is to say damages are *presumed* by the payment of an unreasonable charge, and the measure of damage is a question of law instead of a question of fact.

It then went on to say:

> The distinction between the rule of damage of the *International Coal Case* in respect to discriminatory rates and the rule of damage in the *Darnell-Taenzer Case* in respect of unreasonable rates is apparently based upon what is said to be the common-law principle that an unreasonable charge is equivalent to an "extortion" or "overcharge." (Emphasis ours)

Of course, there is nothing in the decision of Mr. Justice Holmes in the *Darnell-Taenzer Case* which would support that interpretation of it.[22] Nothing the Court was called upon to decide necessitated such reasoning. The simple fact was that beginning in 1906 Congress had delegated to the Commission the complete power to fix rates. On the theory (a) that such power, being legislative in its operation on future rates, could not in any event be delegated to the courts, and (b) that the uniformity sought by the act could not be achieved unless a body "informed by experience" should have original and exclusive jurisdiction on the question of *both* past and future reasonableness (*Texas & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426) the Supreme Court simply held that where the Commission has declared a rate charged to have been unreasonable it follows as of course that the one who paid that rate has been damaged in the amount of the excess. There is not a word or an inference in the decision that common-law considera-

[22]Note that it was fully reaffirmed in the *Sloss-Sheffield Case, supra.*

tions entered into it, or that "extortion" in the common-law sense had been practiced.

But the Commission continued its criticism:

> But there appears to be no real analogy between an action to recover an *extortion* or *overcharge* and an action to recover an unreasonable charge under the Act to regulate commerce. The common-law action is more nearly analogous to an action to recover a charge over and above the published rate. At common law the overcharge was often in fact an *extortion.* But the exaction of a *published* charge which is legal under the statute, and which is afterwards found to be unreasonable, is in no proper sense an *extortion,* inasmuch as the law itself requires the payment of the published rate or charge. In publishing rates in the first instance *carriers have no way of knowing* that a regulating commission will subsequently find a particular rate to be unreasonable. (Emphasis ours)

Please note parenthetically how the idea of "extortion" or the carriers' "belief" about the rates permeated these observations. Please note, also, that these observations were all made by way of support *for a change in the law.* The *change,* however, has never been made by legislation.

After some additional comment upon the proposition that reparation in many cases never reaches the person damaged, the Commission made this specific recommendation:

> The law might well affirmatively recognize that private damages do not necessarily follow a violation of the act; and provide that sections 8, 9, and 16 of the act shall be construed to mean that no person is entitled to reparation except to the extent that he shows that he has suffered damage. The close analogy between a relatively unreasonable or unjust rate and an unjustly discriminatory or unduly prejudicial rate, and the difficulty of determining just when a rate becomes unreasonable or that it is unreasonable per se, *suggest that the law should provide that if a rate is found to be unreasonable the rule of damages laid down in the International Coal case should control.* (Emphasis ours)

Again, Congress refused to amend the act.

We cite these attempts by the Commission to have the rule of damage announced in the *Darnell-Taezner Case* changed[23] because we feel that the rule later announced in the *Eastern Livestock Case of 1926,* 144 I. C. C. 731, and resorted to here is merely another means of invoking the sort of theories which have been repeatedly rejected by Congress. The Commission has escaped judicial disapproval only because of the acceptance by the Bar of the "negative order" doctrine as a preventive of judicial review.

The only answer in the motion to affirm to our contention that it is utterly irrational to conclude from evidence addressed solely to the cost of service that rates were not unreasonable during the study period but became unreasonable several years later *and during a period of ascending costs* is found at p. 12, and reads:

> This contention fails to take account of the fact that the Commission in determining the reasonableness of a rate for the past and in awarding reparation performs a different function from that of determining the reasonableness of a rate for the future and prescribing a rate for the future.

As we have pointed out, the difference first noted by this Court in the *Bear Case,* as to the quasi-judicial quality of a

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[23]And, incidentally, the rule in that case that damage under section 1 should be the precise difference between the unreasonable rate charged and the rate found reasonable originatd with the Commission itself, when it sought to forestall claims for collateral damage. In *Perry* v. *Florida Central & Peninsular R. Co.,* 3 I. C. C. 740, 749 (1892), it said:

> The damages thus suggested are purely speculative and not susceptible of legal computation. They are as uncertain and remote as though claimed on the ground that if the transportation rate had been reasonable the complainant would have raised a larger crop * * *.
>
> The Commission sees no reason why it should * * * deviate from the rule that the measure of reparation due to injured parties for unreasonable rates is the difference between the rate actually charged and the reasonable rate which should have been chargd.

finding as to the past and the quasi-legislative quality of a finding for the future, does not rest at all upon any difference in the standard of reasonableness or in the art of rate making, but solely upon the fact that findings as to the past are necessarily tied to an award of monetary damage. If in the statutory command that rates must be "just and reasonable" and the declaration that unjust and unreasonable rates are "prohibited and declared unlawful" Congress intended that different *standards* should be applied as between the past and future it would have said so. As a matter of fact the words "just and reasonable" which have appeared unchanged in the act since its original passage, applied only to past rates for a period of 19 years, or from 1887 until 1906, because it was not until the latter year that the Commission was given power to prescribe rates for the future. *Cincinnati, New Orleans & T. P. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 184.

In the concluding paragraph of the motion to affirm the government makes reference to the decision of this Court in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 389. That decision stands as a bar against an award of reparation only in those situations where a carrier has charged a rate under compulsion of a Commission order. The rate here assailed has never been applied under such compulsion and in its denial of reparation the Commission did not rely upon that decision. It is rather odd that the government in defending this case should now make reference to that decision when, in precisely the same factual circumstances, it held in the cases involving rates west of Lynchburg which were part of the very rate structure here involved that the doctrine of the *Arizona Case* did not apply (See full discussion in *State Corp. Comm. of Virginia* v. *Norfolk & W. Ry. Co.*, 190 I. C. C. 325, at pp. 344, 345).

If the decision of the lower Court is allowed to stand in the circumstances of this case it will amount to judicial sanction for assumption by the Commission of the power to

grant or deny reparation not upon a determination as to whether the rates charged were or were not unreasonable based upon the single standard set by Congress but upon whether the carriers were "justified in believing" them to have been reasonable. The Commission in any given case will be free merely to quote from its decision in the *Eastern Livestock Case,* as it did here with or without some vague and general accompanying statements and the shipper will be without recourse.

Wherefore, we pray that the motion to affirm be denied.

Respectfully submitted,

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